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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY RAY JONES,

Defendant and Appellant.

A138504

(Alameda County
Super. Ct. No. C169294)

A jury found defendant Tony Ray Jones guilty of second degree robbery involving the personal use of a firearm, and being a past-convicted felon in possession of a firearm. After defendant admitted enhancement allegations that he had two prior felony convictions, the trial court sentenced him to state prison for an aggregate term of 15 years and eight months. On this timely appeal, defendant contends: (1) the trial court erred in allowing the prosecution to introduce evidence of an uncharged offense; and (2) the trial court violated Penal Code section 654 when it imposed an eight-month consecutive term for the gun possession charge. We conclude that, due to an unusual procedural wrinkle, defendant's first contention was not properly preserved for review, and, in any event, the claimed error would not qualify as prejudicial. We further conclude that the claim of sentencing error is baseless. Thus, we affirm.

BACKGROUND

On the evening of February 19, 2012, Armando Cuatlatl was about to enter an Oakland liquor store when two Black males came up to him. Defendant, whom Cuatlatl positively identified in court, pointed a gun at him. Defendant was wearing a black

jacket, black gloves, and a black bandana over the lower half of his face. The other man took \$40 and an ATM card from Cuatlatl. The two then fled on foot.

James Gates and Nakia Dickens were driving in Gates's van about a block from the liquor store. Gates had stopped the vehicle and was talking to an acquaintance when defendant—whom Gates knew and who he positively identified in court—and another Black male came running up to the van from the direction of the liquor store. Dickens also identified defendant as the one of the men who entered the van carrying a gun.

Defendant identified himself to Gates, and told him to open the door. Defendant was wearing black gloves, had a black bandana over his face, and was carrying a gun. Defendant and other man entered the van.

The men's entry was observed by Oakland Police Officer Cesar Garcia, who believed he might be witnessing a carjacking or some other crime. As the van began moving, Officer Garcia followed. When defendant caught sight of Garcia's cruiser, he stated "I ain't about to go back to jail." Garcia radioed for assistance to halt the vehicle.

Gates told defendant to get out of the vehicle, but Dickens kept driving because Gates was afraid of defendant, who was "fumbling with the gun." Gates repeated that defendant had to get out. Defendant made remarks which Gates and Dickens interpreted as evidencing defendant's resolve to confront the officers.

Officer Garcia observed defendant roll out of the moving van, holding a gun. Defendant, still holding the gun, fled on foot. Officer Garcia left his vehicle and followed. During the ensuing chase, Officer Garcia, believing defendant was about to shoot him, shot defendant. When defendant was taken into custody, he was wearing gloves and a bandana, but no gun was in his possession.

Another officer discovered a gun along the route of defendant's foot chase. Upon examination, no fingerprints or usable DNA linked defendant to the weapon. However, a fingerprint of Pablo Rodriguez was found on the gun's magazine. Rodriguez testified that he had shown the gun to defendant prior to it being stolen.

Robert Washington testified that on the morning of February 23, 2003, he was sitting in his car at a gas station in Richmond when he was approached by two Black

teenagers, one male, one female. After Washington allowed the female to use his cell phone, the male pointed a gun at Washington, ordered him out of the car, and drove away in the car. Washington identified defendant as the gunman.

REVIEW

The Trial Court Did Not Abuse Its Discretion By Allowing Evidence of An Uncharged Offense

As indicated, the trial court allowed the prosecution to introduce evidence of defendant's 2003 robbery of Robert Washington, introduced over defendant's objection. The court's decision was made at the conclusion of a pretrial hearing on defendant's in limine motion to preclude the prosecution from introducing evidence of two such incidents. The trial court granted the motion as to one incident, but denied it as to the Washington incident. The court ruled as follows: "As to the 2-23-03 incident, there was a conviction. It looks to the Court to be material to the issue of intent, intent to deprive the owner of possessions permanently. And it also is relevant to prove intent, common plan. So the Court feels the probative value in this particular incident outweighs the prejudicial effect. Sufficiently similar. It's highly probative. And the Court would allow it to be used in the case-in-chief to be proved by a preponderance of the evidence."

Defendant contends that this ruling constituted an abuse of the trial court's discretion under Evidence Code section 1101 and 352, as well as infringing his right under the United States Constitution to a fair trial.

Evidence Code section 1101 provides in pertinent part:

"(a) . . . [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act"

In addition to intent, the evidence here was ruled admissible to show a similar plan or design. The dual basis might be significant because the standards for admission differ:

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] ‘[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .’ [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ‘probably harbor[ed] the same intent in each instance.’ [Citations.]’ [Citation.]

“A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate ‘not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.’ [Citation.] ‘[T]he difference between requiring similarity, for acts negating innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.’ [Citations.]

“To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

Defendant’s appointed counsel makes a persuasive case that the 2003 robbery and carjacking of Mr. Washington are so dissimilar to the instant offense that the intermediate

standard for plan or design cannot be met, and even the most lenient standard to prove intent will not be satisfied. However, our review of the record revealed what we began this opinion by characterizing as a “procedural wrinkle.”

The trial court made its ruling on the prosecution’s in limine motion at the conclusion of a hearing at which the court heard brief argument only. And the *only* description of the 2003 robbery and carjacking of Mr. Washington that was before the trial court at that time was the following in the prosecution’s papers:

“Facts of Richmond PD #03-20476—2003 ROBBERY AND CARJACKING

“On February 23, 2003, around 11 p.m., defendant and an African American male adult approached victim Robert Washington’s car as he was exiting a gas station in Richmond. The victim was 70 years old at the time and was alone in his vehicle. As defendant walked [past] Mr. Washington’s car at the exit of the gas station, defendant asked what time it was and if he could borrow Mr. Washington’s phone. The defendant was dressed in dark clothing at the time. Mr. Washington let defendant and the other male use his phone, but after a few minutes asked for his phone back so he could leave. At that point, the second male approached Mr. Washington with a black semi-automatic gun and pointed it at Mr. Washington. The men ordered Mr. Washington out of the car and defendant got in the passenger side door. Both defendant and the other men [man?] drove off, stealing Mr. Washington’s car and his cell phone. Mr. Washington called the police from a payphone to report the crime. Defendant was subsequently identified in a photo lineup.”

The discrepancies between this version and Washington’s trial testimony are significant. The report had the robbery occurring in the evening, whereas Washington testified that it was in the morning. The report had defendant being accompanied by an “African-American male adult,” whereas at trial Mr. Washington identified the person as “a young Afro American teenager around . . . 13 or 14 years old” and “female.” Washington testified that “the young lady asked me to use my telephone,” but the report has the request being made by defendant. Most importantly, in the report it was the other

male who brandished the weapon, but at trial it was defendant who pointed the gun and ordered Washington out of his car.

But none of these discrepancies was brought to the attention of the trial court before it made the ruling quoted above. Nor was the court alerted when, after Washington's testimony was concluded, defendant's trial counsel stated that Washington's testimony "about an incident . . . in 2003 . . . was prejudicial" "when, in fact, there was no evidence of a robbery that occurred with Mr. Jones' involvement."

And when defendant moved for a new trial, one of the grounds was as follows:

"The trial court allowed the People to introduce evidence in their case in chief that, on February 23, 2003—nearly a decade before this incident—Mr. Jones was convicted of a felony. The People's stated justification for admitting such evidence was to show that Mr. Jones engaged in a common plan or scheme in the commission of both alleged acts. This evidence should not have been admitted because it was improper character evidence used for the sole purpose of confusing the jury by suggesting that Mr. Jones had a propensity to commit the charged acts. Due to the generic nature of the 2003 offense; and the fact that it occurred nearly 10 years before the charged crimes, it is inconceivable that Mr. Jones acted with a common plan or scheme in committing both acts.

"Evidence of the 2003 robbery should have been excluded under [Evidence Code] § 352, because the probative value of this evidence was heavily outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury

"By offering evidence of Mr. Jones' 2003 robbery conviction, the prosecution argued that the prior act was sufficiently similar to the charged offense, that it supported an inference that defendant used a similar plan in committing both acts. To support its claim of similarity, the prosecution cited the following factual assertions: 1) both acts occurred at night, 2) defendant was wearing dark clothing; 3) defendant or his accomplice used a weapon; and 4) defendant fled the scene in a car following the alleged robberies. This set of facts could be used to describe virtually any robbery that could conceivably

occur, and hardly demonstrates the existence of a common plan or scheme.”

When the new trial motion was argued, defendant’s counsel did not stray far from his moving papers. He argued that Washington’s testimony was insufficient to support an inference of common plan or design; that “this act [the robbery of Cuatlatl] actually was a spontaneous act”; that the 2003 incident was “too remote,” and; that “the probative value of proving the intent and the common scheme and plan . . . did not outweigh the prejudicial effect.” There were some comments that suggested an awareness of the discrepancies between the prosecution’s in limine version and Mr. Washington’s testimony at trial, but at no point did counsel advise the court that its pre-trial ruling was based on the prosecution’s erroneous “factual assertions” of the 2003 robbery of Mr. Washington, assertions significantly disproven by Washington’s testimony.

Both the charged offense and the 2003 incident involved robberies at gun point. But the first occurred in the morning while the second occurred in the darkness of night. The first saw defendant approach the victim while accompanied by a girl, the second with another male. And while the first saw the victim engaged in conversation, the second opened with the demand for property. The first victim was sitting in a car when approached, while Cuatlatl was walking on the street. Defendant disguised his face in the robbery of Cuatlatl but made no such attempt with Washington. At no point was the trial court squarely told of these discrepancies by the defense.

It is a fundamental rule of appellate practice that the correctness of a trial court ruling is determined “at the time it was made.” (*People v. Farley* (2009) 46 Cal.4th 1053, 1082.) This means that the reviewing court restricts its consideration to “ ‘the record on which it was made’ ” (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070), “and not by reference to evidence produced at a later date.” (*People v. Welch* (1999) 20 Cal.4th 701, 739.) This means that Washington’s subsequent testimony cannot be used to impeach the “factual assertions” presented by the prosecution and accepted by the trial court as the basis for its ruling. (See *In re Arturo D.* (2002) 27 Cal.4th 60, 78, fn. 18 [“subsequent to the suppression hearing (the ensuing ruling of which we review here), Arturo testified at the jurisdictional hearing This testimony was not before the trial court at the time of

the suppression hearing, and it is irrelevant to our inquiry now; in reviewing the trial court's suppression ruling, we consider only the evidence that was presented at the time it ruled." (Italics omitted.); *People v. Champion* (1995) 9 Cal.4th 879, 925 [when there are variations between an offer of proof and the evidence adduced at trial, defendant must bring them to the attention of the court].)

“ ‘We review for abuse of discretion a trial court's rulings on . . . admission or exclusion of evidence under Evidence Code sections 1101 and 352.’ ” (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

Did the evidence before the trial court “support a rational inference of . . . a common plan or design” (*People v. Carter* (2005) 36 Cal.4th 1114, 1147), that is, that the two incidents “ demonstrate ‘ . . . such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations, ’ ” but without requiring that the plan be “distinctive or unusual[?]” (*People v. Ewoldt, supra*, 7 Cal.4th 380, 402-403.) That evidence showed in both incidents that defendant was one of two Black males who approached a single male victim. The approach was made at night. Property was taken at the point of a gun that was brandished but not fired. As common designs go, this is hardly “distinctive or unusual.” But the evidence can be read to disprove randomness, and to depict more than “a series of similar spontaneous acts.” (*People v. Ewoldt, supra*, at p. 403.) There are sufficient common features that the evidence would support a rational inference that there was a plan. It would also satisfy the lesser showing required for a rational inference that defendant “ ‘ “probably harbor[ed] the same intent in each instance.” ’ ” (*Id.* at p. 402.)

“ ‘[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].’ [Citation.] ‘The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial

fundamentally unfair.’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

The evidence of Washington’s robbery was not the sort to unhinge an Alameda County jury of this day and age. The victim was elderly, but no physical harm was inflicted upon him. The threat of such harm, even if only implicit, was undoubtedly traumatic to Washington, but that type of threat almost defines the crimes of robbery and carjacking. (See *In re Travis W.* (2003) 107 Cal.App.4th 368, 375 [“as it is with robbery, the threat of force is implicit in carjacking”].) The robbery of Washington was nine years before the charged incident, but it was not stale as a matter of law. Although evidence of the Washington robbery did ultimately prove to be cumulative to other evidence introduced at trial on the issue of defendant’s intent, this was not known to the trial court when it made its ruling, and does not apply to the evidence being used on the issue of common plan. In light of all of these circumstances, we cannot conclude that the trial court’s ruling amounted to an abuse of the court’s discretion or tipped the trial into fundamental unfairness.

Even if we assumed, solely for purposes of this appeal, that the trial court’s ruling did qualify as an abuse of discretion, such error would not command reversal. The case against defendant, while not overwhelming, was certainly more than commonly strong. Defendant was positively identified by the victim and others as armed and fleeing from the scene. Defendant made statements after the robbery indicating a consciousness of guilt. Defendant was under observation virtually from the robbery to his speedy apprehension, still wearing the distinctive bandana. Thus, the assumed error would not be prejudicial according to state or federal standards. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

There Was No Violation Of Penal Code Section 654

Defendant was sentenced to the middle term of three years for the robbery, with ten additional years for the firearm use enhancement. The two priors added two more years, for a total of 15 years. For the firearm possession count, defendant was sentenced to a consecutive term of eight months, one-third of the middle term.

Penal Code section 654, subdivision (a) (hereafter section 654) provides in pertinent part: “An act or omission which is made punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of punishment, but in no case shall the act or omission be punished under more than one.” Relying on *People v. Venegas* (1970) 10 Cal.App.3d 814, defendant contends the trial court violated this provision when it sentenced him to an eight-month consecutive term for the firearm possession. We do not agree.

Our Supreme Court has addressed the interplay between a firearm possession charge and another offense:

“ ‘The “act” necessary to invoke section 654 need not be an act in the ordinary sense that it is a separate, identifiable, physical incident, but may be “a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.” ’ [Citations.]

“The standard for applying section 654 in the circumstances of this case was restated in *People v. Venegas*[, *supra*,] 10 Cal.App.3d 814. ‘Whether a violation of [the statute] forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’ [Citation.]” (*People v. Bradford* (1976) 17 Cal.3d 8, 22.)

Defendant’s reliance on *Venegas*—and the analytically similar situation in *Bradford*—is misplaced. *Venegas* involved a barroom shooting of a man named Rodriguez. Exactly how and by whom Rodriguez was shot was an open question; the

only direct evidence concerning possession of the weapon prior to the shooting pointed to the gun being brought to the bar by a third person. (*People v. Venegas, supra*, 10 Cal.App.3d 814, 817-820.) The Court of Appeal held that double punishment for both possession of the weapon and its use in an assault with intent to murder was prohibited by section 654: “Here, the evidence shows a possession [by the defendant] only at the time defendant shot Rodriguez. Not only was the possession physically simultaneous, but the possession was incidental to only one objective, namely to shoot Rodriguez.” (*Id.* at p. 821.) In *Bradford*, the defendant was stopped for a traffic infraction by Officer Patrick. Defendant obtained possession of the officer’s weapon and fired several shots at the officer. (*People v. Bradford, supra*, 17 Cal.3d 8, 13.) Following *Venegas*, the Supreme Court reversed separate sentences for both possession of the officer’s gun and using it to assault the officer because “Defendant’s possession of Officer Patrick’s revolver was not ‘antecedent and separate’ from his use of the revolver in assaulting the officer.” (*Id.* at p. 22.)

But *Venegas* has come to be understood as subject to the proviso that “when an ex-felon commits a crime using a firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent distinct intent from the primary crime,” thus permitting multiple sentences. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141.)

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its finding will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones, supra*, 103 Cal.App.4th 1139, 1143.)

Here, as evidenced by its imposing the consecutive sentence, the trial court impliedly found that section 654 did not apply because defendant’s possession was separate and independent from his robbery of Cuatlatl. That finding is supported by substantial if circumstantial evidence that defendant had possession of the weapon prior

to approaching Cuatlatl on his way to the liquor store. Moreover, there was considerable evidence of defendant's possession of the weapon after the robbery, most notably in his pointing it at Officer Garcia in his obvious effort to escape his pursuers. There was no violation of section 654 as claimed by defendant.

DISPOSITION

The judgment of conviction is affirmed.

Richman, J.

We concur:

Kline, P.J.

Brick, J. *

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.